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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 342.

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES, CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, A CORPORATION, PETITIONERS,

VS.

SIMONDS-SHIELDS-LONSDALE GRAIN COMPANY, A CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF.

M. W. Borders, Jr.,
Dupuy G. Warrick,
Wilfred Wimmell,
Counsel for Respondent.

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VS.

SIMONDS-SHIELDS-LONSDALE GRAIN COMPANY, A CORPORATION, RESPONDENT.

STATEMENT OF FACTS.

Respondent believes that petitioners' statement of the case omits essential facts and that a further statement will be helpful to the court.

NATURE OF CASE.

Petitioners sued Simonds-Shields-Lonsdale Grain Company, a corporation, respondent herein, to recover $624.00 claimed to be due for services rendered in installing grain doors on 624 cars furnished respondent under a newly created tariff providing charges of $1.00 per car for services which in the past had been performed by the

railroad carriers without charge. The tariff included the following provision (R. 50A):

> "The railroad will act as shipper's agent and install grain doors at terminal elevator points specified by law, for a charge of $1.00 per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time."

Respondent denied liability and claimed that it was not liable because it had not made a "prior arrangement" and for other reasons which will be mentioned hereafter.

Practice prior to the establishment of tariff.

Prior to the establishment on July 1, 1935, of the tariff in question, it had long been the practice of the railroads, including petitioners, to furnish grain doors at terminal points and to prepare cars for bulk grain loading by installation of such grain doors without cost to the shippers. From 1906 to 1909, the carriers at such terminal points either installed the doors themselves or employed agents to install them or employed the elevator companies, making them an allowance therefor. In 1909 a tariff was filed covering the installation of grain doors at Kansas City and providing for an allowance to elevator companies where the work was done by them. This tariff was cancelled in 1911. Thereafter and until July 1, 1935, when the carriers filed the tariff involved in this suit the carriers had always furnished the doors and installed them at their own expense (R. 56, 76, 77).

Establishment of tariff and refusal of the shippers to make a "prior arrangement."

The tariff in question, item No. 70 of W. T. L. Tariff 330, was filed and published by the carriers to become effective July 1, 1935. That part of this tariff applicable to this case is as follows (R. 50A):

> "Grain doors or lumber for necessary side door barricades (also for necessary end-door barricades, if

car is equipped with end doors requiring such protection) for carload shipments in bulk of grain, grain products, seeds and other articles taking same rates, as specified in lists Nos. 1, 2, 3, 4, 5, 6, items Nos. 200 to 270, inclusive, will be furnished at loading stations without charge, by the initial road-haul carrier (see Note 1). The grain doors or lumber so furnished shall be installed by the shipper (or his agent) and at his expense. The railroad will act as shipper's agent and install grain doors at terminal elevator points specified below, at a charge of $1.00 per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time."

From the time this tariff was filed, respondent and other shippers refused to authorize the railroads to install the doors as the shippers' agents. They positively and unequivocally refused to make a prior arrangement as provided in the tariff and claimed that it was the obligation of the railroads to furnish cars suitable to transport grain safely and that cars furnished without grain doors installed were unsuitable; that the carriers were compensated for such service by the line-haul rate and that it would be improper to shift this obligation or expense to the shippers (R. 26, 27, 56).

Upon receipt of the proposed tariff the shippers, including respondent, on July 2, 1935, wrote the carriers a letter in which they positively and emphatically refused to enter into any arrangements or to authorize the carriers to act as their agents in the installation of such grain doors. This letter, set out in full in the record, beginning on page 40, after stating that the shippers expected the carriers to continue to furnish cars equipped with grain doors after July 1, 1935, as they had prior to that date, stated (R. 41):

"Said undersigned parties further notify you that if ordinary box cars are furnished and supplied upon such orders they will expect them to be fully coopered or prepared with necessary side-door barricades completely installed and ready for loading.

> "Said undersigned parties further notify you that regardless of the tariff items or any other rules or regulations, they decline and will decline to pay any charges whatsoever which may be demanded by you for any work or service involved in making your cars suitable for loading bulk grain, and in particular they decline and will decline to pay any charge for the alleged service of installing or placing grain doors or barricades in cars tendered by you upon order for loading bulk grain."

The carriers recognized that the shippers by their letter of July 2, had refused to make a prior arrangement and on July 15, 1935, they wrote respondent and other shippers requesting a compliance with the provisions of the tariff and warning the shippers that unless the prior arrangements were made as provided in the tariff it would be necessary to provide cars without grain doors installed. Said letter stated in part (R. 43):

> "*Unless therefore you make unqualified arrangements* pursuant to the terms of the tariff it will be necessary to provide cars which *do not have the grain doors installed* although, of course, the carrier will provide grain doors or lumber as contemplated by the tariff" (italics ours).

Although the carriers in said letter of July 15, recognized the necessity of making a prior arrangement and requested that this be done, they continued after July 1, 1935, to furnish cars with grain doors properly installed although no such arrangement was made. In fact they so continued from July 1, 1935, to February 29, 1936 (R. 43). Each month during said period the railroads rendered the shippers bills for cars furnished covering the charges of $1.00 per car (R. 43). On November 22, 1935, respondent returned to petitioners all bills theretofore rendered, with a letter declining to pay said bills, said letter being as follows (R. 44):

"November 22, 1935.

"Mr. H. W. Myers, Manager, Kansas City R. R. Clearing House Ass'n, Kansas City, Mo.

"Dear Mr. Myers:

"We are returning you herewith bills for $1.00 per car charge for alleged service of installing grain doors in cars furnished at the Rock Island and Milwaukee Elevators loaded with bulk grain for transportation over the various lines issuing these bills.

"There is no tariff authority for this charge unless it be Item No. 70 of W.T.L. Tariff 330, which item however provides in paragraph (1) that the railroad will act as the shipper's agent and install grain doors at terminal elevator points at a charge of $1.00 per car if prior arrangements for the service are made with the carriers covering specified period of time.

"This tariff became effective on July 1st and we know of no change in the practice of furnishing and installing grain doors from that existing prior to July 1st, the carriers continuing to furnish upon orders for cars to transport bulk grain, cars completely equipped with grain doors and ready for use. We have made no arrangement with any carrier under which such carrier was to install the doors as our agent as contemplated by the tariff above referred to.

"For this reason will you please advise tariff authority for these charges and if the bills were issued under authority of Item 70 W.T.L. Tariff 330 will you please advise how you arrived at the conclusion this item justifies the charge in the absence of any arrangement as contemplated by paragraph (1)?

"Yours very truly, Simonds-Shields-Lonsdale Grain Co., by A. B. Frederickson."

To this letter the carriers responded on January 9, 1936, with the astonishing proposition that they had accepted the letter of July 2, 1935, as a "prior arrangement" although the carrier's letter of July 15, 1935, showed this to be untrue (R. 44, 45).

On January 15, 1936, respondent again denied that it had "made any arrangement with any carrier." This letter is as follows (R. 45, 46):

"January 15, 1936

"Mr. H. W. Myers, Manager, Kansas City Railroad Clearing House Association, Kansas City, Missouri.

"Dear Sir:

"Replying to your letter of January 9th, file 7968 and returning various bills for charges covering alleged service of installing grain doors in cars loaded with grain at the Milwaukee and Rock Island Elevators.

"We have noted all you have said and cannot agree with you that Mr. Scott's letter of July 2nd, under our signature could be construed as making a prior arrangement with the carriers for this service.

"As we stated in our letter of November 22nd, we have not made any arrangement with any carrier to perform this service in accord with the provisions of Item 70 W.T.L. tariff 330, which states this arrangement is to be made with the carriers and to cover a specified period of time.

"For this reason we decline to pay the bills and return them with this letter.

"Yours very truly, Simonds-Shields-Lonsdale Grain Co., A. B. Frederickson."

After the receipt of this letter the carriers continued to furnish cars with grain doors properly installed (R. 43).

The carriers replied to the above letter on March 30, 1936, and again insisted that the tariff regulations be complied with and asked for the making of definite arrangements and for the fixing of a period of time during which such arrangements should be in force. The letter stated in part (R. 47, 48):

"In order that the tariff regulations may be strictly complied with, you will advise whether you elect to have carriers furnish cars with grain doors or lumber installed, or whether you elect to install grain doors or lumber for your own account.

"In the event you wish carrier to perform the installation service the period of time this arrangement shall be in force shall be specified.

"If you decline to enter into an arrangement, as provided by the tariff, or if you elect to install the grain doors or lumber for your own account, the carrier will furnish cars inspected and O. K.'d for grain loading, but without grain doors or lumber installed."

The respondent and other shippers made no answer to this last letter (R. 71). It will be noted that the carriers, as late as March 30, 1936, were even then insisting that the tariff provisions be strictly complied with and were asking for the making of definite arrangements and for the period of time such arrangements should be in force.

Filing of this suit.

This suit was begun by petition filed on April 4, 1936 (R. 2). The petition set forth the provisions of the tariff in question and prayed a recovery in the sum of $1.00 per car for 624 cars furnished with grain doors installed between July 1, 1935, and February 29, 1936 (R. 4-25).

On April 13, 1937, after various intermediate proceedings, respondent filed its answer denying liability and alleging that it was the duty of petitioners to furnish cars properly equipped with grain doors installed without charge to respondent; that the petitioners had furnished such cars so equipped and ready for loading for a period of many years and that they were compensated therefor by the line-haul rate; that the furnishing of the services and facilities covered by the tariff in question was a part of the transportation service which petitioners were under a duty to furnish to the respondent and for which they were compensated by their line-haul rate and that the purported tariff was unreasonable and that no prior arrangement was ever made (R. 26, 27).

Proceedings before Interstate Commerce Commission.

While the suit filed by petitioners was pending in Kansas City, the validity and reasonableness of this tariff was presented to the Interstate Commerce Commission. The case was submitted to the commission on January 14, 1937 (R. 51). In that proceeding it was the contention of the shippers that it was the duty of the carriers, as part of their transportation service, to furnish cars with grain doors installed, and that cars furnished without such doors installed were unsuitable and did not satisfy the carrier's obligations (R. 56). They also contended that should it be found by the commission that it was reasonable and proper for the carriers to make a charge for installing grain doors, then the tariff in question was nevertheless improper because the charge of $1.00 per car was unreasonable (R. 63). On April 12, 1937, the majority of the Interstate Commerce Commission decided that it was not unreasonable to require that the shippers at their expense install the doors furnished by the carriers as such installation was "an incident of loading bulk grain" (R. 61). But the commission sustained the contention of the shippers and held that the charge of $1.00 per car was unreasonable and that a charge of 60 cents per car would be proper. Its finding in this respect is as follows (R. 65):

> "6. We find that in those instances where the railroad acts or has acted as shipper's agent in installing grain doors at the terminal elevator points specified in the schedules here under consideration the charge of $1 per car was, is, and for the future will be, unreasonable to the extent that it has exceeded or may exceed 60 cents per car. An order for the future will be entered."

In the opinion of the majority of the commission it was held that the clause relative to prior arrangements was incorporated for the carriers' benefit and could be waived by them "in those instances in which the

carriers acted as shippers' agent" (R. 63). Three of the commissioners dissented and held that (R. 69):

> "The finding that the requirement may be waived at the discretion of defendants because the rule is in their own interest is directly contrary to the ruling of the Supreme Court in *Davis* v. *Henderson*, 266 U. S. 92, wherein the court held that a tariff rule providing that orders for cars must be in writing could not be waived by a railroad."

The commission did not approve the tariff in question, but found it to be unreasonable and ordered that the railroads cease and desist from publishing or collecting a charge in excess of 60 cents per car. It further ordered that the railroads on or before July 20, 1937, establish a new tariff in the manner prescribed by Section 6 of the Interstate Commerce Act for a charge not to exceed 60 cents per car. The order is as follows (R. 69-70):

> "It is ordered, That the above-named defendants, according as they perform the services at the respectively designated points, be, and they are hereby, notified and required to cease and desist, on or before July 20, 1937, and thereafter to abstain, from publishing, demanding, or collecting, for the installation by them of grain doors in railroad cars placed for loading with grain, grain products, or seed, in bulk, at the terminal elevator points designated in the aforesaid report, a charge which shall exceed the charge named in the next succeeding paragraph hereof.
>
> "It is further ordered, That said defendants, according as they perform the services at the respectively designated points, be, and they are hereby, notified and required to establish, on or before July 20, 1937, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in Section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, for the installation by them of grain doors in railroad cars placed for loading with grain, grain products, or seed, in bulk, at the aforesaid terminal

elevator points, a charge which shall not exceed 60 cents per car.

"And it is further ordered, That this order shall continue in force and effect until the further order of the Commission.

"By the Commission."

Opinions of the district and circuit courts.

Although the Interstate Commerce Commission, on April 12, 1937, had disapproved and found the tariff made the basis of petitioners' suit against respondent to be unreasonable, and had directed the establishment of a new tariff in the manner prescribed by the Interstate Commerce Act, petitioners continued the prosecution of their suit against respondent and the case was tried and submitted to the court on May 6, 1937, approximately a month after the decision of the Interstate Commerce Commission (R. 27). Petitioners did not amend their petition, but the cause was tried on the petition as originally filed. The prayer of the petition was not reduced, although, after the case was tried and submitted, petitioners in their requested conclusions of law asked that the court render judgment for $374.40 (R. 79).

The trial court, in a memorandum opinion filed May 19, 1937, held that the provisions of the tariff had not been complied with and that no recovery could be had. The court said (R. 86):

> "Not only, however, were 'no prior arrangements for the service' of installing the grain doors in question entered into by the plaintiffs and defendant, but the defendant positively and unequivocally refused to enter into such 'arrangements.' Since, on the face of the tariff, 'prior arrangements' were prerequisite to the effectiveness of the tariff it would seem clear that plaintiffs cannot prevail in this case unless the party or parties for whose benefit the condition precedent of the tariff was written could and did waive it."

The court then held that following the decision in *Davis* v. *Henderson*, 266 U. S. 92, such provisions of the tariff could not be waived and pointed out that the commission had found the charge of $1.00 to be unreasonably high and that it could not be said that it was not for the benefit of the shipper "that he shall have the right of election between himself installing a grain door (a 60 cent job) and paying another $1.00 for doing that job."

The majority of the court of appeals approved the holding of the trial court and held that under the authority of *Davis* v. *Henderson*, 266 U. S. 92, the provisions of the tariff had not been complied with, could not be waived and petitioners could not recover.

SUMMARY OF POINTS.

I.

The installation of grain doors was not a transportation service but was an incident of loading and a part of the shipper's duties. By the tariff in question the railroads offered to install the doors as the "shipper's agent" for a consideration, if the shippers made "prior arrangements for the service." The usual rules must be applied to such tariff to determine whether the shippers authorized the railroads to act as their agent and whether there was a "prior arrangement."

II.

The facts conclusively show that respondent and other shippers did not make a "prior arrangement," but unequivocally refused to authorize the railroads to act as their agents in making the installations. While the respondent and other shippers insisted that the railroads should install the grain doors at their expense, this did not constitute a "prior arrangement" and was insufficient to make the shippers liable for the tariff charges.

III.

Even if this tariff covered a carrier's service and not a shipper's service, the requirement of the tariff of a prior arrangement for a specified period of time was an integral essential part of the tariff which was not complied with and could not be waived. Moreover, the evidence shows that neither the railroads nor the shippers intended to waive the provisions of the tariff or did anything that would constitute a waiver.

IV.

The fact that the respondent received the coopering service without paying the tariff charge did not constitute unlawful discrimination and is no reason for dis-

regarding the positive provisions of the tariff requiring a prior arrangement for a specified time and requiring that the railroads be authorized as "shipper's agent." Strict adherence to tariff provisions does not constitute unlawful discrimination even though the shipper may receive a benefit. Moreover there is no evidence in this record to show that discrimination would exist if respondent does not pay for coopering these cars.

V.

Petitioners cannot recover because this suit is based upon a tariff which the Interstate Commerce Commission has held to be unreasonable and unlawful.

VI.

No jurisdictional grounds for review are presented. The lower courts adhered to settled rules of tariff construction in construing this tariff. They required a strict adherence to the requirements of the tariff and in so holding followed decisions of this court.

ARGUMENT.

Petitioners have overlooked and ignored essential facts.

Before discussing the points relied upon by respondent, it will be well to call this court's attention to the following essential and important facts wholly overlooked in petitioners' argument. Respondent believes that a proper consideration of these facts completely destroys petitioners' contentions.

1. The Interstate Commerce Commission found that the installation of grain doors was not a transportation service, but was an incident of loading, a shipper's service. Accordingly, by the tariff in question, the carriers simply offered, upon prior arrangement being made with the shippers, to perform a shipper's service for a consideration. In so doing the railroads were dealing with a service that was not a transportation service and their negotiations were subject to the usual rules applicable to contracts.

2. While the petitioners acknowledge in their brief that the tariff gave the carriers a right to be paid only where they were authorized to and acted as the *shipper's agents* they completely ignore the facts that conclusively show that no agency relationship was created. The respondent and other shippers positively and unequivocally refused to make any arrangement whereby the railroads would be authorized to install the doors as the shipper's agents (R. 40-49). They always insisted that it was the carrier's obligation to make such installations and further that the charge of $1.00 per car was an unreasonable one (R. 26, 27, 63).

3. Petitioners wholly ignore the fact that the shippers had good reason to refuse to make an arrangement or agreement whereby the railroads should install the

doors at $1.00 per car, because they contended that such charge was unreasonable and their position was directly sustained by the Interstate Commerce Commission (R. 65).

4. Petitioners have sued under a tariff to recover charges which the Interstate Commerce Commission found to be unreasonable. In so holding, the Interstate Commerce Commission directly upheld the contention of the shippers.

5. Petitioners seek a recovery under the provisions of a tariff which by reason of the opinion of the Interstate Commerce Commission never had any validity for the Interstate Commerce Commission, after finding the tariff in question to be unreasonable, ordered that the railroads file a new proper tariff establishing a charge not to exceed 60 cents per car.

6. Petitioners have treated the tariff in question as having the effect of law, claiming that charges under such tariff must be collected else there will be unlawful discrimination, completely overlooking and ignoring the fact that this was a carrier-made tariff; not a commission-made one, and that this court has held that carrier-made tariffs are always subject to being unlawful if found by the Interstate Commerce Commission to be unreasonable. *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 52 S. Ct. 183, 76 L. Ed. 348.

7. The parties could not waive the requirements of the tariff in question nor did they attempt to do so. Both the railroads and the shippers recognized that in order for the railroads to act as "shipper's agent" the tariff requirement, of a prior arrangement, had to be complied with.

I.

The installation of grain doors was not a transportation service but was an incident of loading and a part of the shipper's obligation which the carriers offered to perform as shipper's agent upon the making of a prior arrangement. Whether a prior arrangement was made is determined by application of the usual rules governing the making of contracts.

When the carriers filed this tariff it was upon the theory that it was the obligation of the shippers to make installation of grain doors and that this was not a transportation service. Item No. 70 of tariff 330 provided that the carriers would furnish the doors but that "the grain doors or lumber so furnished shall be installed by the shipper (or his agent) and at his expense" (R. 50a). The railroads by other provisions in such tariff offered to "act as shipper's agent" and install such grain doors at a charge of $1.00 per car if "prior arrangements for the service" were made with the carriers for a "specified period of time."

When the tariff was filed the shippers contended that it was improper because the installation of such grain doors was the obligation of the carriers. Consequently they were unwilling to authorize the railroads to act as their agents in the installation of these doors (R. 40-49). The Interstate Commerce Commission by its decision supported the position taken by the carriers and held that the installation of such grain doors "is an incident of loading," and that the shippers should install such doors at their expense (R. 61). Since the decision of the commission conclusively established that this was an incident of loading and therefore something to be performed by the shippers, it is perfectly apparent that the carriers had neither a duty nor a right to make the installations with expectation of pay therefor unless the necessary "prior arrangement" was made constituting them the "shipper's agent."

Petitioners' brief ignores these facts and throughout their brief it is assumed that this was a tariff covering transportation services required of the carriers. Their argument that none can avoid the provisions of tariffs and the charges collectable thereunder, and that it would be unlawful discrimination to deny a recovery in this case ignores the facts. They treat this case as though the tariff covered a transportation service required of carriers. The cases relied upon are not in point for the reason that where a service is one which a carrier is not bound to perform, but one which is to be done by the shipper then, as to any arrangement whereby the carrier undertakes to perform such service the parties deal with each other as ordinary individuals and subject to the usual rules applicable to the making of contracts and the creation of the relationship of principal and agent.

In Elliott, Railroads, Vol. 4, p. 463, it is said:

> "While a railway company cannot by contract or otherwise change the nature of its public duties or obligations it may, where it is not under a duty or obligation to the public, contract to perform service in the character of a private carrier of goods or passengers. In other words, where there is a right to refuse to perform the services requested there is a right to contract for their performance in a different capacity from that which rests upon a railroad company as a public or common carrier."

And in 10 C. J. 190, it is said:

> "Where the goods offered for shipment are such as the carrier is not bound to accept for transportation, it may, if it chooses to carry them, impose such limitations on its common-law liability as common carrier as it sees fit. In other words, it enjoys the same freedom of the right of contract as other corporations or persons and may name the conditions under which it will undertake the transportation. This is not violative of public policy."

The foregoing rules and their applicability to a case like this are firmly established. *Santa Fe, P. & P. R. Co.* v. *Grant Bros. Construction Co.*, 228 U. S. 177, 57 L. Ed. 787; *N. Y. C. R. R.* v. *Lockwood*, 21 L. Ed. 627, 177 Wall. (U. S.) 357; *Black & White Taxi Cab & Transfer Co.* v. *Brown & Yellow Taxi Cab & Transfer Co.*, 276 U. S. 518, 72 L. Ed. 681, 48 S. Ct. 404; *Cleveland C. C. & St. L. Ry. Co.* v. *N. Y. C. & St. L. Ry. Co.*, 11 F. (2d) 850; *Oklahoma Belt R. Co.* v. *Schaff*, 282 Fed. 128; *Thompson* v. *C., B. & Q. R. Co.*, 157 I. C. C. 775.

In the *Lockwood Case, supra*, this court said (17 Wall. (U. S.) l. c. 377):

> "A common carrier may, undoubtedly, become a private carrier or a bailee for hire, when as a matter of accommodation or special engagement he undertakes to carry something which it is not his business to carry."

And in the *Grant Bros. Construction Co. Case, supra*, this court held a contract to be valid which exempted a carrier from liability for loss or damage to the property of a construction company. It was contended that the contract was invalid because the rates provided were lower than those appearing in published schedules of the carrier. But this court held otherwise and said (228 U. S. l. c. 188):

> "It is clear that in dealing with transportation of this character over its own road in connection with construction or improvement, a railroad company is not acting in the performance of its duty as a common carrier, and the arrangement for free or reduced rate carriage for the necessary materials and men used in the work, when it is a part of the contract, entered into in good faith, and not as a subterfuge, is not obnoxious to the provisions of law prohibiting departures from the published tariffs, for the reason that such an agreement lies outside the policy of these provisions."

The other cases cited support the same rule and directly sustain respondent's contention that, where a railroad acts with reference to services not required of it as part of its transportation service, it contracts as does any ordinary person and is subject to the usual rules. The decision of the Interstate Commerce Commission in *Thompson* v. *C., B. & Q. R. Co.*, 157 I. C. C. 775, shows the application of these rules. There a carrier, by reason of an agreement with a shipper, furnished and fed feed to livestock. In holding that this was not a transportation service, the commission said (l. c. 777):

> "It does not follow that any and all services performed by common carrier, engaged in interstate commerce in connection with property transported, are subject to the provisions of the act. Many services are performed by a carrier as incidents to transportation and in its capacity as a bailee for hire, 10 C. J., p. 80; 2 Hutchison on Carriers (3rd Ed.), Sec. 640. A reasonable construction of the term 'transportation' as defined in Section 1 of the Interstate Commerce Act limits it to such services as a carrier is required by law to provide upon reasonable request."

The commission, in concluding its opinion, said (l. c. 778):

> "It is our view that the feeding of complainant's livestock at Montgomery was not a service of transportation within the meaning of the act, which defendants can be required to provide upon reasonable request. The fact that the charges assailed are published in a tariff on file with this commission cannot confer jurisdiction upon us where it has not been granted by Act of Congress."

Since by reason of the decision of the Interstate Commerce Commission the installation of grain doors was not such a service as a carrier could be required to provide upon reasonable request, the authorities cited by petitioners are not applicable to this case and the first question for this court to determine is whether or not under the facts disclosed by this record respondent constituted

petitioners its agents to install the grain doors and whether or not it made any arrangement or agreement authorizing the carriers to act for respondent for a consideration to be paid by respondent as provided in the tariff. These questions must be determined by the application of the usual rules governing the creation of agencies and the making of contracts.

II.

No prior arrangement was entered into between the petitioners and the respondent shipper and no agency was created.

It needs little consideration of the facts in this case to show that the respondent did not constitute petitioners its agent to install the grain doors. By its tariff the railroad offered to act as "shipper's agent" if "prior arrangements for the service" were made for "a specified period of time." From the time this tariff was filed, respondent and the other shippers refused to authorize the railroads to install the doors as the shipper's agents. They positively and unequivocally refused to make a "prior arrangement." Their reason for doing so was apparent to the railroads, and it was no secret that all the shippers were claiming that it was the obligation of the railroads to continue to furnish cars properly equipped with grain doors as they had prior to the time when this tariff was established (R. 26, 27, 56). When the proposed tariff was received by the shippers they wrote the carriers on July 2, 1935, emphatically refusing to enter into any arrangements whereby the carriers would be authorized to install the doors as agents for the shippers. They insisted that the installation be made by the carriers under the same arrangements as had existed theretofore (R. 41). The carriers understood that the shipper's letter of July 2 constituted a refusal to make a prior arrangement and on July 15, 1935, they wrote respondent and other shippers requesting a compliance with the pro-

visions of the tariff and warning the shippers that unless a prior arrangement was made it would be necessary to provide cars without grain doors installed. Said letter stated (R. 43):

> "Unless, therefore, you make unqualified arrangements pursuant to the terms of the tariff it will be necessary to provide cars which do not have the grain doors installed, although, of course, the carrier will provide grain doors or lumber as contemplated by the tariff."

While the carriers in this letter recognized the necessity of making a prior arrangement before they would have any authority to install the doors and be paid therefor, they continued after July 1, 1935, and continuously until after February 29, 1936, to make the installations, although no such arrangement was ever made. Each month during said period the railroads rendered the shippers bills for cars furnished covering the charges of $1.00 per car. On November 22, 1935, respondent returned to petitioners all bills theretofore rendered with a letter declining to pay said bills and stating (R. 44):

> "We have made no arrangement with any carrier under which such carrier was to install the doors as our agent as contemplated by the tariff above referred to."

It was not until January 9, 1936, that the carriers made the astonishing and unfounded assertion that they had accepted the letter of July 2, 1935, as constituting a "prior arrangement." The carrier's letter of July 15, 1935, showed this could not be true (R. 44, 45). On January 15, 1936, respondent again denied that it had "made any arrangement with any carrier" (R. 45, 46). After receiving this letter, and on March 30, 1936, the carriers again insisted that the tariff regulations be complied with and asked that definite arrangements for a fixed period of time be made (R. 47, 48). It is thus seen that the carriers, as late as March 30, 1936, after all the cars involved in this

suit had been furnished, were even then insisting that the shippers make the necessary prior arrangements.

Under these facts it is not surprising that the trial court found that (R. 86):

> "Not only, however, were 'no prior arrangements for the service' of installing the grain doors in question entered into by the plaintiffs and defendant, but the defendant positively and unequivocally refused to enter into such 'arrangement.' "

Under the decisions applicable to facts like those in this case, it is firmly established that no arrangement or agreement was consummated which would give the railroads any legal claim whatsoever. *La Compania Bilbiana de Navegacion De Bilbao* v. *The Spanish-American Light & Power Co.*, 36 L. Ed. 1054, 146 U. S. 483; *McWilliams Bros.* v. *Davis*, 285 Fed. 312; *McCaffrey's Sons* v. *Director General of Railroads*, 282 Fed. 730; *Drake* v. *Mo. State Life Ins. Co.*, 21 F. (2d) 41.

In the La Compania case a ship broker acting on behalf of the owner, but without authority, included in the charter-party an agreement that the owners would install at their expense water ballast tanks for carrying oil in bulk. When the owner was notified of the provision he refused to ratify the action of the broker. Discussion ensued wherein the hirers of the ship demanded that the owners fit the tanks. The owners expressed a willingness to do so, but refused to pay the expense. The hirer renewed its demand for the tanks and demanded that they be installed at the expense of the owners. They refused to pay the hire on the ship until this was done. Thereupon the owners again refused to pay the expense, but expressed a willingness to fit the tanks at the expense of the hirer. Finally the owners, after notifying the hirer, Spanish Light & Power Company, that it would be held for the expense, to avoid further delay, proceeded to fit the tanks to the ship. The fitting was completed and the

Spanish Company was notified that the bills for the expense would be submitted to it. As in the case at bar, it refused to pay these bills. Under these facts this court held that there was no contract, arrangement or agreement, by which the Spanish Light & Power Company could be held liable for the expense; that there could be no recovery either on contract or for the value of the services on implied contract. The court said (146 U. S. l. c. 496):

> "It is quite clear that the libelant could not, in any event, recover from the respondent any part of the expense of fitting up the tanks in the vessel to carry petroleum in bulk. There was nothing in the acts of the parties to throw on the respondent any obligation to fit up the tanks or to pay the expense thereof, if the work should be done. The respondent never promised to make or to pay for any such alteration. On the contrary, it always refused to recognize any such liability on its part, and insisted it was the duty exclusively of the libelant to pay therefor. If the libelant chose to fit up the tanks, that was a voluntary act on its part in regard to work upon its own property, for which it has no remedy against the respondent.
>
> "It is contended, however, that, as the respondent refused to retain or use the vessel unless the tanks were fitted up by the libelant, as provided in the charter party, an implied contract arose; and that, as the libelant did such fitting up, the respondent must bear the expense. But it is found, in effect, that the respondent always and constantly refused to assume the expense, and insisted, as the ground for the making of the alterations, that under the charter-party it was the duty of the libelant to make them. No duress by the respondent is alleged in the libel, or shown."

In the *McWilliams Case, supra*, the owners of tugs gave notice to the hirers, McWilliams Bros. Co., that they would not be responsible for damages to a tow. The McWilliams Co. made the following answer:

"New York, September 6, 1918.

"Mr. D. C. Chase, Sup't Steam Towing, Pennsylvania R. R., Cortlandt Street, N. Y.—Dear Sir: We beg to acknowledge the receipt of your letter of the 2d inst. in reference to the nonresponsibility of your tugs for damage in towing boats by your company, even through negligence. We will not accept your terms as stated in your letter, but we reserve the right to continue to report our boats for towing to your company under the same conditions that have previously prevailed in reference to the responsibility for damage, and if you accept the orders to tow our boats, you do so on the same terms and conditions that have heretofore prevailed.

"Yours very truly,

McWilliams Bros., Inc.

DE.TH By D. Eberle."

Under these facts the court followed the La Compania case and held that there was no meeting of the minds sufficient to constitute an agreement and that the carrier could not under the circumstances avoid the responsibility of his own negligence.

Nor are there any facts upon which the railroads would be entitled to recover the reasonable value of their services for having installed the grain doors. The facts in this case prevent the implication of any contract as the basis of a claim to recover reasonable charges. It is well established that a contract cannot be implied contrary to the intention of the parties or where it is against the express declarations of the party to be charged. 5 C. J. 1385; 71 C. J. 48; *Municipal Water Works Co.* v. *City of Ft. Smith*, 216 Fed. 431; *Landon* v. *Kansas City Gas Co.*, 300 Fed. 351.

The reasoning in *Southern Express Co.* v. *Faut*, 78 S. E. 197, 12 Ga. App. 447, is applicable here. In that case the Faut Fish Co. of Savannah, Georgia, wrote the Southern Express Company as follows:

"We desire to put you on notice that we do not want any more of the fish coming to us

from Florida points reiced while in transit. If any are delayed it is not our fault, and your company will have to use their judgment in disposing of them. We should have no cause to pay reicing charges on fish that come to us by express from Florida when they make the schedule time."

Thereafter the Faut Fish Co. ordered fish from Oak Hill, Florida, consigned to itself. They did not come through in schedule time and were reiced during shipment. The Fish Co. declined to pay icing charges. The carrier contended that it had filed a tariff for such icing charges and that it was entitled to recover them; that to forbid recovery would amount to discrimination. It was held that the carrier was not entitled to icing charges because it was not authorized to furnish these services at the Faut company's expense and upon doing so was merely a volunteer. The court distinguished the case from those cases where a carrier furnishes proper transportation services under tariffs filed and approved by the Interstate Commerce Commission. The court said (78 S. E. l. c. 198):

"* * * The case is one for the application of the elementary principle that no one is required to pay for something which he does not want, and which he has protested against having supplied to him. No one is required to be benefited if he does not wish to be, and certainly no one is required to accept and pay for something which another assumes will be beneficial to him when he does not entertain the opinion that it will be beneficial. A cannot perform a service for B over B's protest, and then compel B to pay for it. * * * The plaintiff in error further insists that not only is the tariff allowed by the Interstate Commerce Commission and the charge for icing in the nature of a regulation which is reasonable and therefore can be imposed by the shipper, but that to permit one shipper to direct that his fish be shipped without icing from a particular section in avoidance of its general rule would tend to throw its business as a carrier into hopeless confusion and to involve it in interminable difficulties. * * * The In-

terstate Commerce Commission, under the provisions of the Interstate Commerce Act (Act Feb. 4, 1887 as amended June 18, 1910, fixes the rate at which services of various kinds shall be performed by carriers of various kinds. But the exercise of this power to promulgate tariffs for services actually performed in transportation does not deprive the passenger, nor the owner of goods delivered for transportation, of the right to contract for such services, as either, as the case may be, may deem necessary for the safe transportation of his property, or of his person, or compel him to pay for services which he may not think necessary; and it may in fact be unnecessary to his own comfort or safety, if a passenger, or to the safety and dispatch of his goods, if he be the owner. The Interstate Commerce Commission has full authority to promulgate rates and rules regulating and fixing the charges of sleeping car companies, and where one becomes a passenger upon a sleeping car, he subjects himself to the regulations and the sleeping car company must collect, and the passenger must pay the fixed rates—no more and no less. The same is true as to the rates and regulations applicable to the passenger upon a railroad company's train, but it does not follow that it is within the power of the railroad company to compel a passenger to occupy a sleeping car, and to pay the rate which the commission allows to be charged for the sleeping service, when the passenger does not wish to avail himself of it. Likewise a carrier might be authorized by the approval of the Interstate Commerce Commission to fix and charge a rate for icing, but it would not be a matter wholly within the discretion of the carrier as to whether a shipment should be iced. If this were true, the carrier might elect to ice shipments which would be damaged, rather than benefited, by the operation. The owner has the right to direct the manner and the route in which his goods shall be shipped, and as ruled above, in the absence of anything appearing to the contrary, the carrier may assume that the consignee is the owner of the goods delivered to it by the consignor for shipment to the consignee without reservation."

Respondent submits that the reasoning of the court n the foregoing case is perfectly sound and directly applicable to the case at bar. It was for respondent to say whether or not the petitioners should install the grain doors as respondent's agents. It refused to acknowledge such agency and repeatedly declined to make the prior arrangement contemplated and provided by the tariff. The carriers had no right to install the car doors with expectation of payment therefor unless they were authorized to do so as the shippers' agents. The mere fact that the shippers insisted that it was the duty of the railroads to furnish and install grain doors at their expense, did not mean that they could do this work and expect the shippers to pay therefor. It was not their obligation to install such doors and had they refused to do so it would have been up to the shippers to fit and install the doors as best they could.

Respondent and the other shippers had good reason to refuse to permit the carriers to make the installation upon the terms stated in the tariff. The carriers were demanding $1.00 per car and the shippers and respondent always claimed that this was an unreasonable charge (R. 63). The shippers were also claiming that it was the obligation of the carriers to make the installation without charge. The carriers did not have to accept this view of the matter. They could have refused to install the grain doors because the tariff provided, "The grain doors, or lumber so furnished, shall be installed by the shipper (or his agent) and at his expense." Instead, they proceeded to furnish the cars with doors properly installed but without the required agreement from the shippers. The opinion of the trial court covering this situation is well stated (R. 87).

> "The $1.00 charge is unreasonably high; the Interstate Commerce Commission so ruled in the case cited. The plaintiffs now admit that in no event should they have judgment at a higher rate than sixty cents per car. Plaintiffs concede that the real value of the services rendered is not more than sixty cents.

How can it be said that it is not, in part at least, for the benefit of the shipper that he shall have the right of election between himself installing a grain door (a sixty cent job) and paying another $1.00 for doing that job. Again, how can it be said that a choice as to whether 'the railroad will act as shipper's agent' *vel non* is of interest only to the railroad and of no interest whatever to the shipper?"

III.

The requirement of the tariff of a prior arrangement for a specified period of time was an integral, essential part of the tariff which was not complied with and could not be waived.

The tariff required several things, all of which were lacking in this case. It required (1), a prior arrangement; (2), to cover "a specified period of time," (3), whereby the railroads were authorized to act as "shipper's agent." The facts indisputably show that there was no agency, no prior arrangement and no specified time agreed to. Such was the finding of the trial court and the circuit court of appeals agreed with this finding.

Petitioners contend under Point B (Petitioners' Brief p. 18) that the only prior arrangement required by the tariff was for the shipper to request or demand that the carrier install the grain doors *"as the agent of the shipper."* But in this case the facts show that there was no agency. There is not the silghtest basis for claiming that there is anything in the record to show that the carriers were authorized to act as agents of the shippers. But petitioners claim that this contention is captious (Petioners' Brief p. 26) because "under the tariff the carrier could not lawfully install the grain doors except as agent of the shipper." This is quite true, but it does not follow that the fact of installation proves the existence of the agency as petitioners assume. Facts sufficient to show the agency contemplated by the tariff are wholly lacking. Petitioners contend that the requirement of the tariff of

a prior arrangement must be deemed to have been complied with or waived else there would be unlawful discrimination. This argument ignores the fact that there can be no unlawful discrimination if the tariffs are complied with.

Ignoring the points heretofore made in this argument and assuming that the provisions of the tariff in question must be applied and construed as are tariffs covering services required of carriers, then the contention of petitioners that the facts were sufficient to justify a recovery of the charges stated in the tariff is in direct conflict with those decisions holding that provisions like those included in this tariff are an integral part of the tariff which cannot be waived.

Davis v. *Henderson*, 266 U. S. 92, 69 L. Ed. 182; *Louisville & N. R. Co.* v. *Chatters*, 279 U. S. 320, 73 L. Ed. 711; *Davis* v. *Cornwell*, 264 U. S. 560, 68 L. Ed. 848; *VanDusen Harrington Co.* v. *Northern Pacific Railway Co.*, 32 F. (2d) 466, 60 F. (2d) 394; *American Railway Express Co.* v. *American Trust Co.*, 47 F. (2d) 16, cert. den. 284 U. S. 629.

In *Davis* v. *Henderson*, 266 U. S. 92, 69 L. Ed. 189, the tariff provided that orders for cars for use by shippers of cattle should be in writing. No written notice was given but the station agent had been notified orally. It was contended that since the carrier had notice, it was unnecessary that the notice be in writing. The Supreme Court held that the provision of the tariff requiring that the notice be in writing was an essential part of the tariff which could not be waived. It was said (266 U. S. l. c. 93):

> "The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariffs. The rule was a part of the tariff. *Georgia, F. & A. R. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 197, 60 L. Ed. 948, 36 S. Ct. 541; *Missouri, K. & T. R. Co.* v. *Ward*, 244 U. S. 383, 61 L. Ed. 1213;

Davis v. *Cornwell*, 264 U. S. 560, 60 L. Ed. 848, 44 S. Ct. 410."

Following the Henderson case, the courts have repeatedly held that such provisions as that in the tariff in question requiring a prior arrangement for a specified period of time cannot be waived, but that such requirements must be strictly complied with. In *VanDusen Harrington Company* v. *Northern Pacific Railway Company*, *supra*, a tariff required that the railroad give the consignee notice of the location of tracks where cars of grain were being held. By custom this practice was not followed. Subsequently, the carrier sued for charges and the shipper defended that the notice required by the tariff had not been given. The carrier contended that the provision had been waived. The Circuit Court of Appeals of the 8th Circuit, relying upon *Davis* v. *Henderson*, *supra*, held it could not be waived and said (32 F. (2d) l. c. 470):

> "It is probably true that upon inquiry at the yard office, the consignees could ascertain the location of the hold tracks in North Minneapolis with greater or less delay, but it cannot be denied that the terms of the tariff, which would appear to be conditions precedent to the right to impose these reconsignment charges, were not observed. Such tariffs are construed strictly. The carrier was not compelled to publish its tariff in these precise terms; having done so it must abide by them."

This rule was more fully discussed in the same case in 60 F. (2d) 394, where the court said, l. c. 397:

> "We think there is no merit in the contention that the VanDusen Harrington Company was estopped from asserting that Rule 1 was not complied with by the railway company. Neither by waiver nor by estoppel can the duly published tariff rules and charges of a common carrier be modified or abrogated. *Davis* v. *Henderson*, 266 U. S. 92, 45 S. Ct. 24, 69 L. Ed. 182; *Davis* v. *Cornwell*, 264 U. S. 560, 44 S. Ct. 410, 68 L. Ed. 848; *Missouri, Kans. & Tex. Co.* v.

Ward, 244 U. S. 383, 37 S. Ct. 617, 61 L. Ed. 1213; *Georgia, Fla. & Ala. Ry.* v. *Blish Milling Co.*, 241 U. S. 190, 36 S. Ct. 541, 60 L. Ed. 948; *American Ry. Express Co.* v. *American Trust Co.*, (C. C. A.) 47 F. (2d) 16.

> "In *Davis* v. *Henderson, supra*, there was involved the rule requiring that orders for cars given to the carrier's local agent must be in writing. Plaintiff, a shipper, contended that the rule had been waived. The Supreme Court said: 'There is no claim that the rule requiring written notice was void. The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariffs. The rule was a part of the tariff.'"

And in closing its opinion, the court stated, l. c. 398:

> "We are not clearly conv nced that the decision on the former appeal was erroneous and unsound, but on the contrary think it was correct; the parties were simply held to the plain unequivocal provisions of the tariff."

It will be noted that the circuit court of appeals in the foregoing case relied upon the decision of the Supreme Court in the Henderson case. In addition it relied on *Davis* v. *Cornwell*, 264 U. S. 560, 68 L. Ed. 848. Here the Supreme Court held that tariff provisions must be strictly adhered to and consequently a contract by a railroad company to provide a shipper with cars on a day certain was invalid.

Since the decision of this court in *Davis* v. *Henderson, supra*, the Interstate Commerce Commission has repeatedly held that railroad tariffs requiring notices in writing must be strictly complied with and if the notice is not given in writing, a recovery of charges cannot be had. *Milne Lumber Co.* v. *Michigan Central R. Co.*, 118 I. C. C. 580; *Republic Coal Co.* v. *Chicago, St. Paul Railway Co.*, 85 I. C. C. 331; *National Fire Proofing Co.* v. *Bellefonte*

Central R. Co., 102 I. C. C. 345; *Central West Coal & Lumber Co.* v. *Chicago, B. & Q. R. Co.*, 104 I. C. C. 452; *Louisell Pine & Hardwood Co.* v. *Chicago, R. I. & P. Railway*, 132 I. C. C. 341; *Consolidated Lumber Co.* v. *Lehigh Valley R. Co.*, 139 I. C. C. 278. In the Milne Lumber Company case the tariff provided that when carload freight was refused, "notice of such refusal shall be sent by wire to consignor." Such notice was not given, although other notice was given to the consignor. The commission held this insufficient as a basis for demurrage charges and said (l. c. 581):

> "As the shipment was unclaimed, it became the duty of the Grand Trunk on July 12, to send the consignor notice by wire to that effect, as provided by Rule 4, Section E. Such notice was not sent. It is immaterial whether complainant received notice otherwise that the shipment was unclaimed, for the tariff requirement that consignor be advised by wire could not be waived, such notice being a prerequisite to the accrual of demurrage after the expiration of the five days mentioned in Rule 4, Section E-1. *Davis* v. *Henderson*, 266 U. S. 92; *Campbell Construction Co.* v. *L. C. & S. E. Railway Co.*, 95 I. C. C. 603."

Moreover, since the decision in *Davis* v. *Henderson*, *supra*, the commission has held that where the right to freight charges is conditioned upon an agreement between the carrier and shipper, such agreement in the form required by the tariff must be shown. *Milne Lumber Co.* v. *New York Central R. Co.*, 167 I. C. C. 743; *American Lumber & Export Company* v. *Central of Georgia Railway Co.*, 91 I. C. C. 65.

In *United States* v. *Durkee Famous Foods, Inc.*, 17 Fed. S. 846, the court followed *Davis* v. *Henderson*, and held that where a tariff provided that orders for tank barges be in writing such requirement were conditions precedent to the right to collect the tariff charges.

Numerous decisions of this court and the lower federal courts hold that all the provisions of a carrier's tariff

must be strictly complied with; cannot be waived and that such tariffs have the effect of a statute. *Penn. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, 57 L. Ed. 1446; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 52 L. Ed. 681; *Davis* v. *Cornwell*, 264 U. S. 560, 68 L. Ed. 848; *Georgia F. & A. R. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 60 L. Ed. 948. It is fundamental that tariff provisions are to be strictly construed and any ambiguous provisions are to be construed favorably to the shipper. *Southern Pacific Co.* v. *Lothrop*, 15 F. (2d) 486; *Atlantic Bridge Co.* v. *Atlantic Coast Line R. R. Co.*, 36 F. (2d) 163; *Union Wire Rope Corporation* v. *A., T. & S. F. Ry.*, 66 F. (2d) 965; *Updike Grain Co.* v. *C. & N. W. Ry.*, 33 F. (2d) 486; *K. C. Southern Ry.* v. *Albers Com. Co.*, 223 U. S. 575; *Gulf, O. & S. Ry.* v. *Hefley*, 158 U. S. 98; *K. C. Southern Ry. Co.* v. *Carl*, 227 U. S. 639.

Moreover as pointed out by the circuit court of appeals (R. 99), the evidence shows that neither the railroad company nor the shipper ever attempted to waive the requirements of the tariff.

IV.

The fact that the respondent shipper received the coopering service without paying the tariff charge did not constitute unlawful discrimination and is no reason for disregarding the positive provisions of the tariff requiring a prior arrangement for a specified time.

Up to the time the carriers established the tariff in question they had always installed grain doors in Kansas City at their expense (R. 76-77). The essence of petitioners' appeal to this court is that to deny petitioners the recovery sought would be to permit unlawful discrimination. Under Point A it is urged that the performance of the service by the carrier without charge would constitute unlawful discrimination and on page 14 of petitioners' brief it is stated:

> "Since under the tariff (R. 50A) plaintiff carrier could perform the service of installation of grain

> doors only as the agent of the shipper, and at a specific charge in addition to the other freight charges, to permit the shipper to receive the benefit of the installation by the carrier without requiring the shipper to pay the charge, necessarily would be to permit unlawful discrimination under the Interstate Commerce Act which requires uniform payment of all tariff charges, 49 U. S. C. A., Sections 2, 6 (7), 10 (1) (2) (4) and prohibits preference or discrimination in any form or by any device, 49 U. S. C. A., Section 41 (1) quoted in Appendix, *Post.*"

This argument is based on a nonexistent fact. The argument assumes that all other shippers in the United States have paid the tariff charge, regardless of compliance with the tariff provisions. Such an assumption is contrary to the facts and entirely unsupported by the record in this case. There is nothing in the record to support the argument made by petitioners.

Point C (p. 20) presents the same argument. Petitioners cite a great number of cases, but all of these are decisions where the courts upheld all the requirements of tariffs in order to prevent discrimination. We agree that rebates and discriminations are to be frowned upon and that agreements between carriers and shippers in contravention of tariffs are void. Contrary to these cases, petitioners seek to disregard essential provisions of the tariff in order to charge a shipper amounts stipulated as charges in the tariff. The cases relied upon by petitioners show that unlawful discrimination lies in a departure from tariffs rather than an adherence thereto. Petitioners seek to justify a failure to comply with a tariff by cases holding that such tariffs must be complied with.

The conclusive answer to petitioners' argument is that it has been repeatedly held that a carrier cannot recover where the tariff has not been strictly complied with, even though the shipper is benefited. In other words, it cannot be urged as a basis for ignoring tariff requirements that if it is not done benefits will accrue in favor of a shipper. *Chesapeake & Ohio R. Co.* v. *Westing-*

house, Church, Kerr & Co., 270 U. S. 260, 70 L. Ed. 576; *VanDusen Harrington* v. *Northern Pacific Railway Co.*, 32 F. (2d) 466; *American Railway Express Co.* v. *American Trust Co.*, 47 F. (2d) 16, cert. den. 284 U. S. 629.

In *Chesapeake & Ohio Railway Co.* v. *Westinghouse, Church, Kerr & Co., supra*, a carrier performed services for which it was not entitled to recover under the provisions of the applicable tariff. The carrier claimed that the shipper had secured the benefit of transportation service for which it should be compelled to pay, otherwise it would be receiving discriminations which should not be permitted. This court held that nevertheless a recovery could not be had which was not permitted and authorized by an applicable tariff.

In the *VanDusen Case, supra*, the railroad failed to comply with the requirement of a tariff that notice should be given as to the location of certain cars. It was held that having failed to live up to the letter of the tariff, it could not recover reconsignment charges, even though the shipper was benefited by the haul.

Following the decision of this court in *Davis* v. *Henderson. supra*, the Interstate Commerce Commission has repeatedly held that in order to be entitled to recover its charges, tariff provisions must be strictly complied with and the fact that a shipper is benefited will not justify recovery where a required agreement or notice has not been had in the manner required by the tariff. *American Lumber & Export Co.* v. *Central of Georgia Railway Co.*, 91 I. C. C. 65; *Milne Lumber Co.* v. *Michigan Central R. Co.*, 118 I. C. C. 580; *Republic Coal Co.* v. *Chicago, St. Paul Railway Co.*, 85 I. C. C. 331; *National Fireproofing Co.* v. *Bellefonte Central R. Co.*, 102 I. C. C. 345; *Central West Coal & Lumber Co.* v. *Chicago, B. & Q. R. Co.*, 104 I. C. C. 452; *Louisell Pine & Hardwood Co.* v *Chicago, R. I. & P. Railway*, 132 I. C. C. 341; *Consolidated Lumber Co.* v. *Lehigh Valley R. Co.*, 139 I. C. C. 278.

Any tariff, although it is discriminatory or contains technical requirements which make it difficult for the carrier to show performance, is nevertheless effective and has the force of law until changed in the proper manner. *United States* v. *Miller*, 223 U. S. 599, 56 L. Ed. 568; *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 66 L. Ed. 943.

So long as a tariff remains operative, all its provisions are binding upon shipper and carrier alike; the shipper cannot recover charges paid on the ground that they were unreasonable or discriminatory, nor can the carrier, without strict compliance with the tariff, recover its charges on the ground that failure to permit recovery would result in rebate or discrimination. *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553; *Texas & P. R. Co.* v. *Cisco Oil Mill*, 204 U. S. 449, 51 L. Ed. 562; *Southern R. Co.* v. *Tift*, 206 U. S. 428, 51 L. Ed. 1124; *Robinson* v. *B. & O. R. Co.*, 224 U. S. 506, 56 L. Ed. 288; *Penn. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, 57 L. Ed. 1446; *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 66 L. Ed. 943; *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156, 67 L. Ed. 183.

V.

Petitioners cannot recover because this suit is based upon a tariff which the Interstate Commerce Commission has held to be unreasonable and unlawful.

After this suit was filed by petitioners, the validity and reasonableness of this tariff was determined by the Interstate Commerce Commission. The case was submitted to the commission on January 14, 1937 (R. 51). The shippers contended that it was the duty of the carriers, as part of their transportation service, to furnish cars with grain doors installed, but that if this were not true, the tariff in question was improper because the charge of $1.00 per car was unreasonable (R. 56, 63).

While the commission held that it was not unreasonable to require shippers to install the doors as part of their obligation to load the cars, the commission also held that the tariff in question was improper because the charge of $1.00 per car was unreasonable (R. 65). The commission ordered that the railroads establish a new tariff in the manner prescribed by Section 6 of the Interstate Commerce Act for a charge not to exceed 60 cents per car (R. 69-70). Under these facts, it is difficult to conceive how petitioners could recover on their petition which was based upon a tariff the Interstate Commerce Commission found to be unreasonable and unlawful. Petitioners attempt to justify a recovery by pointing out that in their requested finding they asked only a recovery at the rate of 60 cents per car. Even so, the action was based upon a tariff which the commission found to be improper and which the commission directed be supplanted by a new tariff for proper charges.

Throughout their argument, petitioners have treated the tariff in question as having the effect of law, claiming that charges under such tariff must be collected else there will be unlawful discrimination, completely overlooking and ignoring the fact that this tariff did not cover a service which could be required of the carriers, and further ignoring the fact that this was a carrier-made tariff, not a commission-made one. This court has held that carrier-made tariffs are always subject to being unlawful if found by the Interstate Commerce Commission to be unreasonable. In *Arizona Grocery Co. v. A., T. & S. F. Ry. Co.*, 284 U. S. 370, 52 S. Ct. 183, 76 L. Ed. 348, this court said (284 U. S. l. c. 384):

> "Although the act thus created a legal rate it did not abrogate, but expressly affirmed, the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard. In other words, the legal rate was not made by the statute a lawful

rate, it was lawful only if it was reasonab
Under Section 6 the shipper was bound to pay t
legal rate; but if he could show that it was unreas
able he might recover reparation."

Moreover, while petitioners, by their petition filed
the district court, sought to recover on the tariff t
amount provided in the tariff, after the case was tri
petitioners have sought to change the nature of said su
and recover 60 cents per car on the theory that this
the reasonable value of the services they rendered. Th
evidence and the cases hereinbefore discussed show the
is no basis for such recovery. Furthermore a suit broug
as this one was cannot thereafter be converted into *quan
tum meruit*.

VI.

No jurisdictional grounds for review are presented.

The petition does not present any question of un
settled general law. This case involves simply the con
struction of a tariff and the trial and circuit courts ap
plied rules settled and established by decisions of th
court. The decision of this court in *Davis* v. *Henderso*
266 U. S. 92, 69 L. Ed. 182, not only supports the opinio
of the circuit court, but necessitates the conclusion
reached by both the trial court and the court of appeal
Since that decision it is settled that all the provisions i
a tariff must be strictly complied with and that suc
provisions cannot be waived. Moreover, the courts hav
repeatedly held that ambiguous tariffs must be construe
favorably to shippers. No new proposition or point o
law is involved in the opinion of the court of appeal

Petitioners rely on *Wabash R. R.* v. *Horn*, 40 F
(2d) 905 (C. C. A. 7). In this case it was held that on
who became the owner of a car of goods in transit wa
liable for freight charges, although he directs that th
charges follow the car. The reason for this holding wa
because the bill of lading so provided and the court simpl

held that in view of that circumstance such person was liable. This case merely requires an adherence to the tariff which is exactly what the trial and circuit courts held in the instant case.

The cases relied upon by petitioners throughout their brief are cases where the courts required strict adherence to tariff provisions and refused to permit waivers, agreements or discriminations conflicting with such tariffs to destroy their force and effect. None of these cases support the point urged by petitioners that the tariff in the instant case should not be strictly construed in order to permit petitioners to have a recovery in the face of explicit provisions in the tariff which have not been complied with.

Many of the cases cited by petitioners merely hold that the carriers are entitled to recover the full charges allowed by the tariff despite agreements, representations and estoppels to the contrary. These are cases where the tariffs are strictly complied with and the courts simply hold that such tariffs must be adhered to. None of these decisions support the points urged by petitioners.

Conclusion.

We respectfully submit that this case was correctly decided and that this court should so hold.

Respectfully submitted,

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